(3)

Supreme Court, U.S.
FILED
MAR 4 1996
CLERK

No. 95-1167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ex rel.
MURRAY W. LINDENTHAL; DONALD B. WILLIS
Petitioner,

vs.

GENERAL DYNAMICS CORPORATION,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

Donald B. Willis, *pro se*
51 Florence Court
Hollister, CA. 95023
(408) 637-9356

---

9 pp

TABLE OF CONTENTS

	PAGE
I. REPLY SUMMARY	1
II. OPPOSITION BRIEF - QUESTIONS PRESENTED	2
III. OPPOSITION BRIEF - PARTIES TO THE PROCEEDING	3
IV. OPPOSITION BRIEF - STATUTORY PROVISIONS	3
V. OPPOSITION BRIEF - STATEMENT OF THE CASE	3
VI. OPPOSITION BRIEF - REASONS FOR DENYING THE PETITION	4
VII. CONCLUSION	7

I. REPLY SUMMARY

The Opposition Brief does not directly address the Questions Presented in the Petition and, in fact, provides no opposition to most of the questions contained in the Petition. The Opposition Brief, instead, presents two other questions and bases its arguments on those. Those Respondent questions differ in scope from the Petition questions as will be discussed in the next section.

A primary element of the Opposition Brief appears to be a question of the credibility of the Petitioner. In fact, Mr. Willis is personally addressed, in less than glowing terms, on some 60 occasions in the 22 pages of the brief. This petitioner sincerely believes that this court will grant or deny the Petition based on its merits without concern for who the author was.

This brief continuously states that this FCA action was and is based strictly on Mr. Willis' personal legal theories and contract interpretations without support of authorities or the record. With all due respect to respondent's counsel, the petitioner believes that is a decision to be made by this court without direction from respondent's counsel.

As background, the petitioner is an unemployed 63 year old party in involuntary early retirement. Under the current conditions of this action, he has a duty as the only available agent of his fellow taxpaying citizens to pursue this fight against fraud. He cannot morally abandon them due to costs of this action which he can ill afford. He is a concerned citizen.

The Opposition Brief is also replete with less than accurate statements. In the interests of brevity, only a few of these will be noted. The Petitioner believes that, should this court grant the petition, the petitioner will be held accountable for his truthful representation of the facts in the courts below. It is hoped that will also be true for the respondent.

This reply addresses each section of the Opposition Brief as paraphrased in the Table of Contents.

II. OPPOSITION BRIEF - QUESTIONS PRESENTED

Question 1. is too narrow in scope. Under Respondent's contention that Fees, Costs and Expenses are three separate and distinct categories under the FCA, a yes answer to this question would preclude an award of costs to a prevailing defendant in a clearly frivolous action. That would be unfair to an injured defendant.

However, under the Petition questions, section 3730(d)(4) of the FCA stands on its own merits without regard to F.R.C.P. 54(d). In that case where costs are a subset of expenses, i.e. expenses include expenses taxable as costs and expenses not taxable as costs, then a prevailing defendant may be awarded his taxable costs in a clearly frivolous action and would not be awarded taxable costs in a good faith action. Those results are reasonable and in concert with the intent of Congress.

Question 2. goes far beyond any question presented in the Petition. This question asks the Supreme Court to determine the innocence or guilt of the defendant which is not appropriate. The questions in the Petition only ask this court to determine if portions of the evidentiary base used by the lower courts were in fact contrary to the law. If this court should concur, then the case would be returned to the lower courts to determine the innocence or guilt of the defendant with the revised evidentiary base.

For example, during the GD MUTES and GD Aperture Card contracts, both the AF and GD had full knowledge and understanding that the Level 3 Drawings produced thereunder were being used and were deemed adequate for the follow-on build-to-print contract for entire MUTES systems. Neither the AF nor GD took contemporaneous exception to that understanding and knowledge by questioning or objecting to the actual use of the drawings on the follow-on contract. Under Federal law, they were

bound to that interpretation on those contracts. Should this court concur, the lower courts would re-evaluate all evidence and establish the defendant's innocence or guilt based on the proper interpretation that the drawings were to be adequate for the intended usage.

It is noted that respondent takes no exception to this GD and AF common understanding and knowledge that the Level 3 Drawings were adequate for usage on the follow-on contract for complete MUTES systems. Respondent only contends that the AF did not intend to do what it did, i.e. award that contract for build-to-print MUTES systems.

III. OPPOSITION BRIEF - PARTIES TO THE PROCEEDING

Murray W. Lindenthal is a party to this proceeding under Supreme Court Rule 12.6 and would be the authorized representative of the Petitioner under Rule 35.1.

IV. OPPOSITION BRIEF - STATUTORY PROVISIONS

The standard of liability under the FCA is not questioned by the Petitioner.

V. OPPOSITION BRIEF - STATEMENT OF THE CASE

1. Misstatement of Fact - On page 3, last para., that "Mr. Willis was employed as an engineer" at Aydin. Mr. Willis was Vice-President of Program Management and Program Manager of the Aydin MUTES program.

2. Misstatement of Fact - On page 4, last para., that Mr. Willis was not "involved in any way" in the GD MUTES contracts. As an official of Aydin, Mr. Willis was involved in verifying to the Air Force that the GD Level 3 Drawings were not legible which resulted in the AF award of the Aperture Card contract to GD for a current and legible set of microfilm of the Level 3 Drawings which GD knew were for the Aydin build-to-print contract.

3. Misstatement of Fact - On page 4, last para., that drawings were used "as a guide to assist Aydin in building entire MUTES systems." Aydin was still required to correct the drawings, obtain AF approval of the corrections and then "build-to-print" to those drawings. Aydin could not deliver MUTES systems which did not comply with the corrected Level 3 drawings. The drawings were not used as a guide.

4. Conflicting Evidence - On page 5, last para., that the Level 3 drawings had "a small number of minor errors." In the Petition at Appendix F-2, the acting Staff Judge Advocate at McClellan AFB noted that "Errors in the data attributable to GD account for at least 960 engineering change orders by the successor contractor, Aydin, at a cost of over $21M." Prior to the end of the Aydin contract, the 960 number rose to over 1,500.

5. Witness Credibility - On page 5, last para., (also Footnote 11/) of the "AF's own acknowledgment" that it originally intended the Aydin contract to be a performance specification contract, not a build-to-print contract. This statement assumes that the formal United States Air Force position is derived from the testimony of AF engineers and is not based on what the AF actually did nor on what the AF contracting officials put in writing or testified to, i.e. assumes that the AF engineers knew more about contractual intent than the contracting officials.

VI. OPPOSITION BRIEF - REASONS FOR DENYING THE PETITION

1. One or a Thousand - On page 8, last para., that the petitioner "does not cite any such decision" supporting his contention that no prior district courts have awarded costs to prevailing defendants in non-frivolous FCA actions. Since the 1986 amendments to the FCA there have been some 1,000 FCA actions gone to judgment. The petitioner, perhaps foolishly, felt it was ridiculous to cite

these 1,000 cases to the courts for them to review the complete judgments to verify that no costs were awarded. In lieu thereof, the petitioner in plaintiffs' appellate reply brief on page 1, lines 8-15 made this statement.

> "In plaintiffs' opening brief in appeal #94-16005, page 2, lines 10-17, plaintiffs noted that neither the district court nor the defendant had identified a single authority where a court had awarded costs to a prevailing defendant in a non-frivolous Federal False Claims Action (FCA) in which the Government had not intervened. Plaintiffs therefor challenged the defendant to expose any such authorities. In this Answer Brief, defendant still identifies no authorities which have awarded such costs or even discussed the possibility of awarding such costs."

Prior to making those statements, the petitioner reviewed case histories and consulted with John R. Phillips, co-author of the 1986 amendments, and Alan Schusterman of Taxpayers Against Fraud, both of Washington, D.C. Neither knew of any cost awards.

Respondent in this Opposition Brief still has not cited a single FCA awarding costs in this situation.

2. Respondent Agreement with Petitioner - On page 10, respondent quotes the district court from *Hairline,* "Expenses not properly taxed as 'costs' are considered 'expenses'." and from *Dickerson,* "Therefore, a court may deny certain expenses while granting others as costs." In pure simple English, those statements define "costs" as a subset of "expenses," as petitioner contends.

3. False Statement - Page 15 to 16, that Mr. Willis references to Col. Schuster and the "Interpretation Agreement" are not supported "because the record does not reflect Mr. Willis' assertions." Col. Schuster's testimony and the Interpretation Agreement are thoroughly discussed in plaintiffs' appellate reply brief (#93-16690) on page 8 under heading "G. Col. Schuster

Contradicts GD Allegations." Col. Schuster's testimony is Plaintiffs' Supplemental Excerpt of Record (PSER) #11 and the Interpretation Agreement is PSER #1.

4. Misstatement of Fact - Page 14, last para., that "according to Mr. Willis, since the data package was not put to that use," i.e. build-to-print. The petitioner has never and will never contend that the AF did not use the data on a build-to-print contract. The AF, under standard procurement practices, used the data in the build-to-print Aydin contract.

5. Witness Credibility - On page 16, last para., that "the AF witnesses testified that" the drawings were "not for buying entire MUTES systems on a build-to-print basis." See item V.5. supra.

6. Misstatement of Fact - On page 16, footnote 10/, that Earl Anderson was "Chief of the AF's reprocurement team." This exact quote was refuted in plaintiffs' appellate reply brief (#93-16690) on page 16, line 17 to page 17, line 4 which points out in the record where Mr. Anderson testified he was just an engineer during the reprocurement period.

7. Unqualified Expert Testimony - Footnotes 9/ and 10/ contain testimony of Devenney, Giangrosso and Arnold relative to MIL-D-1000A Level 3 specification. Plaintiffs' appellate reply brief (#93-16690) on page 10, section "I. GD Level 3 Data Requirements Testimony" specifically identifies in the record where Devenney testified he had never read MIL-D-1000A and Giangrosso and Arnold could not identify the specification as MIL-D-1000A in their testimony.

8. Misstatement of Fact - Page 20, last para., that "anything else suggest that GD was in any way responsible for the AF's decision to pay additional sums to Aydin." In the Petition at Appendix F-2, the acting Staff Judge Advocate at McClellan AFB noted that "Errors in the data attributable to GD account for at least 960

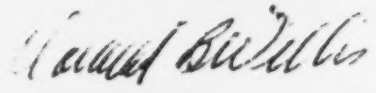
engineering change orders by the successor contractor, Aydin, at a cost of over $21M."

VII. CONCLUSION

The Opposition Brief contains no new or material points which should deter the granting of a writ of certiorari.

Dated: March 1, 1996

Respectfully Submitted,



Donald B. Willis, pro se
51 Florence Ct.
Hollister, CA 95023
(408) 637-9356